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United States
Circuit Court of Appeals
For the Ninth Circuit

CONSOLIDATED INTERSTATE-CALLAHAN MINING COMPANY, a Corporation,
Plaintiff in Error,
vs.
BERTHA D. WITKOUSKI, et al,
Defendants in Error.

} AT LAW

Brief of Plaintiff in Error

UPON WRIT OF ERROR FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

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... FOX & NEIL, WALLACE, IDAHO

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AT LAW

This action was prosecuted by the widow and minor children of Charles F. Witkouski, to recover damages for the death of said Charles F. Witkouski, alleged to have been caused by the negligence of the plaintiff in error. The cause was tried to a jury and resulted in a verdict of Fifteen Thousand ($15,000) Dollars in favor of the defendants in error. This writ of error has been prosecuted from said judgment. In this brief the parties will be referred to by their designation in the trial court.

STATEMENT OF THE CASE.

The deceased, Charles Witkouski, was employed at the defendant's mine in the capacity of a "pusher,"

that being a term used to designate the boss of a crew of men engaged in sinking a shaft not yet completed. On May 18th, 1916, the deceased with the other men on his crew were descending on the rim of the bucket, used in such shaft to raise or lower objects, and, apparently, thinking that the hoistman had lost control of the bucket the deceased jumped therefrom in an effort to catch hold of the dividers, being the wooden beams used to separate the different compartments in the shaft, of which there were three in this particular shaft. The deceased was unable to catch a firm hold of the divider, and consequently fell to the bottom of the shaft and was instantly killed.

In order to clearly present the questions which we desire to raise upon this writ of error, we think it not only proper, but necessary to go with considerable detail into the issues in this case as framed by the pleadings, and the evidence offered in support of these pleadings.

Charges of Negligence Made in the Complaint.

The specific charges of negligence contained in plaintiff's complaint were eight in number, to-wit:

1. That the defendant was negligent in employing and keeping in its service the hoistman operating the hoist at the time of the accident, to-wit, Joe Egbert, for the reasons that said Egbert was incompetent, inexperienced, nervous, and excitable, and that defendant knew that said hoistman was not a fit and proper

person to be intrusted with the operation and care of said hoist. (Paragraph XI. Transcript page 13).

2. That defendant had failed to furnish the deceased a reasonably safe place for the performance of the duties required of him. (Paragraph XII. Tr. p. 13).

3. That the defendant was negligent in failing to furnish to the deceased proper, safe, suitable and adequate machinery, tools and appliances for the performance of the work required of him, in that the bolts, lugs, and keys by which the clutch was fastened to the shaft of the drum of the hoist were loose, worn out, unsafe and inadequate; that the brake band and clutch thereon were worn out, loose, inadequate and unsafe, and that said clutch and the band thereof could not be adjusted by said lever under the control of the hoistman so as to retard and control the speed of said hoist, and prevent the same from attaining a dangerous rate of speed, and from falling to the bottom of said shaft. (Paragraph XII. Tr. p. 13).

4. That a State law of Idaho providing in substance that it is unlawful for any person to sink or operate a vertical shaft to a greater depth than 250 feet without having the same equipped with a mine cage, skip or bucket fitted with safety clutches had been violated by the defendant. (Paragraph XIII. Tr. p. 14).

5. That a State law making it unlawful for any person, company, or corporation to hoist or lower men

at a greater speed than 600 feet per minute had been violated. (Paragraph XIII. Tr. p. 14).

6. That a State law requiring every mining property using hoisting apparatus to keep one copy of the mining code posted on the gallows frame, and a copy of the bell signals before the hoist engineer and on each station, had been violated. (Paragraph XIII. Tr. p. 14).

7. That the defendant was negligent in not promulgating proper and necessary hoisting rules and regulations, and particularly a rule requiring the hoist to be raised and lowered before permitting men to be transported therein. (Paragraph XVI. Tr. p. 14).

8. That the defendant was further negligent in not having its master mechanic make proper and reasonable inspections of the hoisting machinery and apparatus. (Paragraph XVIII. Tr. p. 15).

Certain Charges of Negligence Withdrawn.

At the close of plaintiff's evidence, and during the time when defendant's counsel was making its motion for a non-suit plaintiff's counsel admitted that they had failed to even attempt to prove the charges of negligence embraced in Numbers 1, 4, 6 and 7 above mentioned. (Tr. p. 165-166).

Upon the proposition that defendant had failed to furnish the deceased with a safe place to carry on his work, (number 2, aforesaid) and that the master

mechanic had failed to properly inspect this hoist, (number 8, aforesaid), there is an entire absence of any testimony supporting these charges whatsoever, and no such questions were ever submitted to the jury under the Court's instructions, so that we may assume that these charges of negligence are also out of the case.

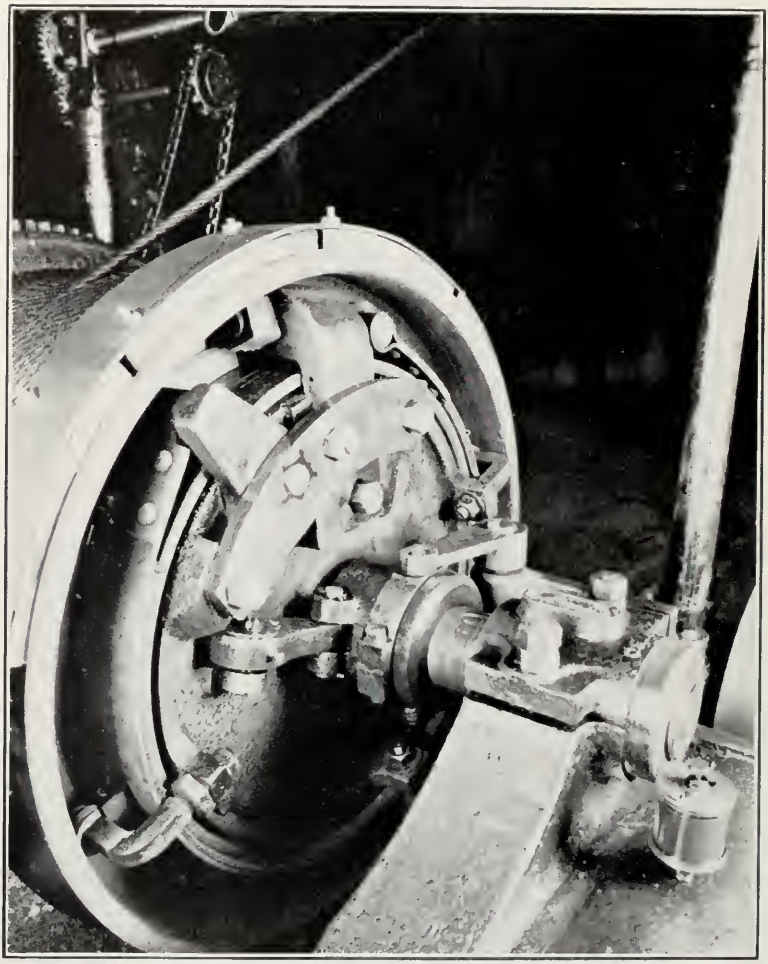
The only charges of negligence upon which the plaintiffs' case was based at the close of the testimony, then, have relation to the condition of the hoisting apparatus, and the particularly alleged defects enumerated in number 3 aforesaid, and in paragraph XII of the complaint, (Tr. p. 13), and the rapid descent of the bucket at the time of the accident (number 5, aforesaid, and paragraph XIII of the Complaint, Tr. p. 14). And the speed of the bucket was so dependent upon the condition of the hoisting apparatus at the time of the accident as to leave the single question of negligence in the case, i. e., whether or not the defendant had discharged its duty of furnishing to its employes, and particularly to the deceased, reasonably safe instrumentalities with which to do the particular work in which he was engaged at the time of his death.

Evidence in the Case.

On the 18th day of May, 1916, the deceased, Charles Witkouski, was engaged with other men in sinking a new shaft in the Interstate-Callahan Mine (Testimony of Al Rengquist, p. 116); this shaft had not yet been completed and was not equipped for use as an operat-

ing shaft (pp. 15, 116); there were three crews of five men each engaged in the work of sinking this shaft (p. 115); each of these crews consisted of a hoistman, three laborers, and a boss who was known as a "pusher" (p. 116); Witkouski was the boss of his gang (Testimony of Moran p. 51) and of the hoistman in that gang (Testimony of Edward P. Moran, pp. 41, 51, 52, 71, 72); (Herbert Erickson, pp. 77, 78, 79, 82, 83); (Joe Egbert, pp. 95, 96); (Al Rengquist, p. 115); (J. H. Lytton, p. 129); and defendant's witnesses Sherman Gregory, p. 191; Norman McDonald, p. 199; and Charles Meade, p. 208.

The hoisting equipment, consisted of a Lake Shore Double Cylinder Geared Hoist, having a drum upon which the cable was coiled, and a clutch band which by compression on the shaft of this drum transmitted the engine power to the drum when in use (p. 220); the hoist was driven by compressed air; the cable was attached to a bucket which was lowered and raised in the shaft for the purpose of raising or lowering any materials which were used in the work being prosecuted, and for the purpose of raising waste from the shaft, and as the means of lowering and raising the men whose work required them to be at that place; this bucket was of the same type as usually used in shafts which are in process of being sunk, and it is always the custom to use a bucket rather than a cage, or skip in incompleted shafts. (Testimony of Moran, p. 50); the hoist itself was admittedly of a kind and character sufficient and proper for the uses to which it was be-



ing put. (Admissions of plaintiffs' counsel, pp. 228, 229, 230).

In the photograph which is appended hereto is shown the hoist in question, showing the cable coiled upon the drum and the clutch on the end of the drum. It will be noticed that the clutch band fastens upon lugs at the upper part thereof, the left hand lug being stationary, but the right hand one being movable by means of a clutch bolt which is shown almost directly at the top of the drawing. By loosening the nut on this clutch bolt the clutch band would be loosened and released to such an extent as would permit the easy descent of the hoist without the use of power or brake.

Witkouski and his crew were working not only for wages, but received in addition thereto a bonus dependent upon the amount of work which they did. (pp. 50, 80). For this, or some other reason, the work of sinking this shaft was being rushed to completion by Witkouski and his crew. (Testimony of Herbert Erickson, p. 79); (See also testimony of witness Sherman Gregory, p. 185).

Witkouski, the deceased, was familiar with this hoist and had himself upon occasions operated the same. (Testimony of Moran, p. 52); (Also testimony of Joe Egbert, p. 193).

The shaft crew which had preceded Witkouski's, and which consisted of a like crew of five men, had been engaged during at least a portion of the day in unwinding and recoiling the cable on the drum of the

hoist (pp. 41-42, 53). The purpose of unwinding and recoiling the cable was to take the kinks out of the same, it being a new cable. (Testimony of Moran, p. 42). In order to unwind or uncoil the cable it was customary and proper and usual to loosen the clutch band on the hoist, so that the men in pulling the cable off the drum would not be compelled to pull against the engine, or in other words to turn over the engine as the cable was uncoiled. (Moran p. 52; Joe Egbert pp. 100-101). This clutch band was released by the loosening of one nut located upon the clutch bolt, (pp. 101-102). When this one nut was loosened, the clutch band ceased to engage the shaft with any considerable degree of firmness, and the cable might then quite readily be pulled off or uncoiled from the drum. The hoistman on the preceding shift, one Lytton, had loosened this nut when the work of unwinding and recoiling the cable had commenced, it being necessary to do so (Testimony of J. H. Lytton, p. 121). It was also customary to loosen this clutch bolt when unwinding the cable (pp. 127, 128).

The deceased and his crew had themselves on other occasions unwound and recoiled this cable (Testimony of J. H. Lytton, p. 127) and Witkouski knew that in doing so it was customary to loosen the clutch bands by unscrewing the nut upon the clutch bolt, (p. 127). After the accident to Witkouski, Lytton, who had loosened this clutch bolt, in a conversation with Sherman Gregory, told the latter that when Witkouski came on shift just preceding the accident, he, Lytton, had advised Witkouski that he had loosened

the nut on the clutch bolt, and hence released the clutch band, and that Witkouski knew that the hoist was in that condition. (Testimony of Sherman Gregory, pp. 180, 189, 190). Although the hoistman Lytton was interrogated expressly as to this conversation with Gregory he does not anywhere deny the same. (pp. 130-131); he merely says he does not remember making the statement, although expressly admitting that shortly after the accident he had some conversation with Gregory, the purport of which he does not attempt to give. And as this is the only evidence upon this point, we have the positive affirmative evidence of Gregory on the one hand, and the lack of recollection of Lytton on the other hand, coupled with his refusal to expressly deny such conversation. And we may fairly assume that when Witkouski went on shift, Lytton told him of the condition of the hoist with particular reference to the loosening of the nut on the clutch bolt. But, be that as it may, it was proven by indisputable evidence, introduced by the plaintiffs themselves, that Witkouski knew that it was usual and customary to loosen this nut before unwinding the cable to take out the kinks. (pp. 52, 127, 128); he and his crew had on other occasions recoiled this very cable (Testimony of Moran, p. 52; Lytton, p. 127, and Joe Egbert, p. 195); and on the particular night of the accident when Witkouski and his crew went on shift the work of rewinding the cable had not yet been completed (Testimony of Moran, p. 53); so Witkouski himself told the other crew to quit and that he and his crew would complete the work of rewinding the cable

(p. 53); and they did complete the work of rewinding the same (p. 53). Nothing was noticed with reference to the clutch bands slipping (pp. 44-45) so Witkouski and his men loaded the bucket with lagging, and all climbed upon the rim thereof preparatory to descending into the shaft.

It was admitted by plaintiffs' counsel that the hoist was sufficient for the work in which it was being used (p. 230). There was some evidence to the effect that the drum shaft was slightly sprung (Testimony of Lytton, pp. 122-123), so that at one place the clutch band engaged the shaft more firmly than elsewhere, and that this was the reason the clutch bolt was loosened while the cable was being unwound. The hoistman on Witkouski's shift contradicted this, however, (Testimony Joe Egbert, p. 194) as does also Norman McDonald (p. 198), Charles Meade, (p. 205) and Hughes, (p. 232). The evidence is uncontradicted, however, that even if the shaft on the drum was slightly sprung, that the clutch bands did properly engage the shaft when this one nut on the clutch bolt was tightened. (Lytton, pp. 129-130). So clear and convincing was the testimony upon this point that the Court in his instructions advised the jury, that it was of little or no importance whether or not the shaft was sprung, as the clear weight of the testimony was to the effect that that fact, if a fact, had nothing to do with the accident, but *that the proximate cause of the accident was the loosening of the nut on the clutch bolt and the failure to tighten the same.* (Instructions of the Court, pp. 257-258); (See also testimony Joe Egbert, pp. 106-107;

J. H. Lytton, pp. 129-130). We quote from the instructions of the Court upon this subject:

> "And I have to say to you that the evidence very strongly tends to show that the condition of this screw or bolt or nut is the proximate cause of the injury, or the accident, rather, and is the only immediate cause of the accident. There is some evidence tending to show that the shaft of the drum was sprung. However, the plaintiffs do not allege, and, as I understand, do not claim now, that this sprung condition of the shaft, even if you credit that testimony, directly contributed to the accident. That was brought in only for the purpose of attempting to explain why it was necessary to loosen this screw or bolt or nut. The defendant contends that it was not sprung, and that that is not the reason for loosening the bolt or nut, and the plaintiff contends that it was. But it is not alleged, and it is not now claimed, that the condition of the shaft of the drum in any wise affected the operation of the hoist upon the evening in question at the time the accident occurred. In other words, the clutch would not have held any better had the shaft been in perfect condition, if it was not in perfect condition. The fact, if it be a fact, that the shaft was sprung, did not in any wise affect the hoist man's control of the hoisting machinery at the time in question. There is some evidence also tending to show that certain keys were loose in and about the mechanism which controlled the clutch or had to do with the operation

of the drum, but I have to say to you that there is no substantial evidence tending to show that the condition of these keys in any wise affected the hoist man's control of the hoist at that time."

The entire hoist, including the clutch and the brake, was in perfect condition. (pp. 105-106-108-194-197-198-199-205-206-207). The bucket was provided with the statutory safety cross-heads (pp. 57-58), and the company had promulgated the customary hoisting rules and regulations, limiting the speed of buckets carrying men not to exceed six miles per hour. (p. 69), and in compliance with the state law had by rule required a bucket that had been out of use for any length of time. to make at least one round trip before carrying men thereon (p. 69).

After Witkouski and three members of his crew had climbed on the bucket and told the hoistman to lower them, and after they had been lowered a distance of perhaps thirty feet, the bucket suddenly begun to descend very rapidly; as if anticipating the accident, and as if for the first time remembering the warning of Lytton that the clutch bolt had been loosened, Witkouski became suddenly frightened, saying that they were going down unusually fast (Testimony of Moran, p. 45) and that something must be wrong (p. 45); he then leaped from the bucket in an effort to catch the divider between the two compartments of the shaft, lost his grip on the divider, and fell to the bottom of the shaft and was killed. The other three men stayed in the bucket, and as soon as the hoistman Egbert

noticed the rapid descent of the same and realized that some one had loosened the clutch bolt and failed to tighten the same, he applied the brake gradually so as not to jar or jolt the men from the bucket, and stopped its descent about 150 feet from the bottom of the shaft. (Testimony Joe Egbert, p. 103); the bucket was stopped gradually and perfect control was had over the hoist by the application of the brake alone. (p. 104); the men who stayed in the bucket were uninjured.

It was shown that on other occasions it was usual for the bucket to be lowered not over 600 feet per minute (p. 80), and we conceive that it is unimportant in this case how rapidly the bucket did descend, except insofar as this might affect the question of whether or not Witkouski was justified in jumping from the same. Moran estimated that the bucket descended at a speed of from 20 to 25 feet per second, but admits that this was merely a guess on his part (pp. 46-63). Undoubtedly the bucket did descend very rapidly between the time when its speed was first accelerated and the time when the hoistman, noticing this rapid descent, applied the brake. During this time the bucket fell approximately 150 feet. (p. 66).

Proximate Cause of the Accident.

In the foregoing we have endeavored to faithfully state the facts proven upon the trial, and mindful of the rule that upon an appeal the evidence will be considered in the light most favorable to the party in whose

favor the jury has rendered its verdict, we have in such statement referred chiefly to the testimony of witnesses called by the plaintiffs.

From the foregoing statement of facts it must be conceded that the defendant had discharged its full duty toward the deceased insofar as that duty required it to furnish him with a reasonably safe place to work, and with reasonably safe machinery, appliances, tools and instrumentalities with which to work; that it had not been negligent in employing incompetent, or inexperienced servants to work with the deceased; that it had promulgated all proper and necessary rules, at least so far as the particular work in which the deceased was engaged at the time of his accident is concerned, and that the machinery and instrumentalities in use were inspected at proper times. It must be conceded also that the hoisting apparatus was in perfect repair, and that the only condition which could be considered as rendering it in any degree inefficient at the time of the accident was the loosened clutch bolt; and that this condition had arisen by reason of one of the servants having purposely loosened the clutch bolt in order to render the work which they were then about to do, more easy of performance, and that this servant, and the servant who succeeded him, had failed to tighten this clutch bolt.

Manifestly, also, the mere loosening of this clutch bolt, and the failure to tighten the same, did not render the hoist inefficient, and could not have caused the accident to the deceased had the hoistman used

proper care in the operation of such hoist, for it is established by uncontroverted testimony that not only were the brakes sufficient to control the hoist, even when the clutch band was entirely loosened, (testimony of plaintiffs' witness, Lytton, pp. 125-126), but that the moment the hoistman himself saw the cable uncoiling too rapidly from the drum of the hoist, that he did by the application of these brakes alone slowly and gradually stop the hoist while it was still something over 150 feet from the bottom of the shaft (testimony of Egbert, pp. 102-103), and with slightly a jar to its occupants.

At the close of the evidence introduced by the plaintiffs, the defendant made its motion for a non-suit, which the Court denied. As we understand the action of the Court upon this motion it was based upon this theory. That in the operation of taking the kinks out of this cable, and in the doing of all of the acts embraced within that operation, a duty of the mechanical department was being performed, to-wit: the non-delegable duty of the defendant company to keep this hoisting machinery in proper repair; that the negligence which was the proximate cause of the accident to the deceased was the loosening of the nut on the clutch bolt, and the failure to tighten the same, and that this negligence was the negligence of the master in failing to properly repair the hoisting apparatus. Let us quote from His Honor's statement as found in the record, (pp. 171-172):

"Now I am inclined rather to take this view of

the application of the well known principles of law, that the occasion for doing what was done in this case, as a result of which the hoisting apparatus became inefficient for the purpose for which it was intended, was the slack in this new cable incident to its use, and that it became necessary to repair it or to readjust it, not because any sudden emergency arose, but, as one witness I think put it, to keep the cable from wearing out rope or cable from wearing out or becoming impaired. Now I am not inclined to take the view under the testimony that the duty of making these repairs or these alterations or adjustments, whatever they may be called, rested upon the crew of which Mr. Witkouski was the foreman. His duties were of an entirely different character. The hoist man was simply being used as an instrumentality. He was not in charge of the hoist, in the sense that he was responsible for keeping it in repair. It is true that the hoistman was subject to his direction for certain purposes, but only for certain purposes. If it be argued that some of the testimony tends to show that the hoist man was entirely under his control, subject to discharge by him, the weight of the testimony I think is clearly to the effect that he was not subject to be discharged by the pusher or foreman of this crew, that if his service in operating the hoist was unsatisfactory, he would be reported to the foreman or superintendent, and it would be for the foreman or superintendent to say whether he should be discharged or transferred or

retained in that particular service. It is quite possible that for various reasons the hoist man might not be satisfactory to the crew, and in the operation of the mine the foreman might believe that he was a competent and efficient man, and still, in order to preserve harmony, might transfer him to some other hoist or set him at some other work, or discharge him entirely. I think that the testimony pretty clearly shows that such were the relations between these parties, and under this rule it seems to have been the duty of the mechanical department to take care of these hoists and to see that they were put in proper repair. Now if the testimony isn't conclusive, at least there is sufficient to require that the question be submitted to the jury, as to whether or not the hoist man, as to this particular condition or defect, was delegated by the mechanical department to remedy it or make the necessary repairs. My impression is, from the testimony, that such was the undertaking, that when the slack occurred in this cable or rope, the instructions from the mechanical department went to the hoist man to see that it was rewound or readjusted to the drum, in order to avoid unnecessary wear and perhaps impairment. Now, to do that it became necessary, as is suggested, to loosen this screw. It wouldn't have been necessary to loosen that screw if the drum shaft had not been sprung and had not been in a defective condition, as I understand the testimony. In other words, the mechanism was such that upon releasing the

clutch lever the clutch would be disengaged entirely from the drum shaft, but because the shaft was sprung, as the drum revolved it would come into contact with the clutch at one point in the course of each revolution, and thus it would offer some resistance to the revolution of the drum. In that view, gentlemen, I think I shall have to adopt the conclusion that in readjusting the rope or cable for that purpose, in loosening this screw, and in leaving the clutch in that loosened condition, without advising the succeeding crew, the preceding crew was acting as the representative of the master, in the performance of a nondelegable duty or obligation, and that therefore the deceased would not be chargeable under the principle of the fellow servant rule."

Now, it is our theory of this case that the proximate cause of the accident to the deceased was not, as the trial court conceived it to be, the loosening of this clutch bolt, and the failure to tighten the same, but was rather the failure of the hoistman to properly operate the hoist; and that in either case, the negligence was that of a fellow servant.

For in the first place if it be conceived that the taking of the kinks out of this cable was the performance of the master's nondelegable duty to keep its hoisting mechanism in a proper state of repair, then it follows that every act involved in the operation of removing the kinks from this cable was a part of this same act of repairing the machinery, and all who engaged in

the performance of that act were, for the time being, servants of the mechanical department, and fellow servants one with the other; so that the man Lytton who loosened the clutch bolt, and the men who pulled the cable from the drum, and the man who with his hands removed the kinks from the cable, and the boss of the crew who superintended this operation, were all fellow servants, working for the time being in the mechanical department. And when the Jacobson crew were told by Witkouski (p. 53) to quit their work, and that he and his crew would finish the work of recoiling this cable, then Witkouski and his entire crew also become servants of the mechanical department, and fellow servants, one with the other. So if it be true that Lytton, who loosened the clutch bolt, and Egbert, who failed to tighten the same, were servants of the mechanical department for the time being, so also were Jacobson the "pusher" on the day shift, Witkouski, and all the men in their respective crews.

As a second proposition, it is established by the evidence of plaintiffs' own witnesses that there were three ways of absolutely controlling the descent of this hoist; one, by means of the air itself, secondly, by the proper application of the clutch, and third, by use of the brake. The brake, in particular, offered a proper and ready means for absolutely controlling the descent of the hoist at all times. Even if the clutch was entirely released, and the clutch bolt entirely loosened, the uncontradicted evidence of the witness Lytton, who at the time of this trial had been discharged by the defendant, and was a most friendly

and willing witness for the plaintiffs, establishes the fact that, had the hoistman been watching, he could by the application of the brake alone have stopped the bucket in an instant, or, as the witness puts it elsewhere, before it had dropped to exceed ten feet. On examination by plaintiffs' counsel, the witness Lytton testified:

"Q. In case this clutch was loose, would your engine have any retarding effect at all when you tried to lower the men down?

"A. No, sir, not if the clutch was loose.

"Q. How long would it take you before you could apply the emergency brakes if you found the engine wouldn't hold it?

"A. In an instant.

"Q. In the meantime it could have dropped some number of feet?

"A. Well, if a man is looking what he is doing he will never let it drop no distance.

"Q. Providing he can do it quick enough?

"A. Well, you can work—you have always got a firm pressure with your brake all the time.

"Q. If you didn't anticipate it you wouldn't be prepared, would you?

"A. The chances are that bucket may drop ten

feet with you before you would realize just what happened." (Lytton, pp. 125-126).

And this is further accentuated by the actual fact that at the time of the accident, as soon as Egbert noticed that the cable was reeling off the drum too rapidly, he could and did, by the use of the brake alone, stop the hoist gradually and properly, without jolt or jar, and without injury to the occupants of the bucket, (Testimony Egbert, pp. 102-103).

"Q. Now, the reason that the hoist descended rapidly was the fact that the clutch was loosened, was it not?

"A. That is what it was.

"Q. What gave you notice of the fact that it was going down too fast?

"A. I saw the cable uncoiling very fast.

"Q. And then you applied your brakes?

"A. Yes, sir.

"Q. And did you have any trouble in stopping the hoist by means of the brake?

"A. Well, I stopped it gradually, I was afraid to stop it quick.

"Q. And you had no trouble in stopping it gradually?

"A. I stopped it about 150 feet from the bottom."

Clearly then if Egbert had been looking at what he was doing and had had the firm pressure with his brake all the time as it was his duty to do, according to the statements of plaintiffs' witness, Lytton, the accident could never have occurred, for the hoist was so constructed that its descent could be controlled by the brake even when the clutch was entirely released, and even with the clutch bolt loosened the accident could not have occurred except for the heedless operation of the hoist by Egbert. And as soon as Egbert observed the rapid uncoiling of the cable, a fact which he should have ascertained immediately had he been attentive to his work, the descent of the hoist was easily controlled by the brake alone.

It is our thought, then, that the proximate cause of the accident to the deceased was not the failure of the defendant to furnish hoisting apparatus which was reasonably safe, nor to keep the same in reasonably good repair, but was rather the failure of the hoistman to operate said hoist with reasonable care and prudence, and to use that degree of watchfulness which a careful, prudent man should have used when lowering human beings.

In a case which we will later call to this Court's attention, the hoist furnished was an hydraulic hoist, and required the injection of water into the cylinders to prevent the too rapid descent of the same. The engineer failed to inject the water before proceeding to lower the men in the bucket, with the result that the bucket dropped, severely injuring one of its occupants.

The Court of Appeals held that the accident was not caused by the negligence of the Company in failing to furnish a safe instrumentality, but rather by the negligence of the hoistman in failing to properly operate an instrumentality which would otherwise have been safe. That case is indistinguishable from the present one. The hoist in this case was indisputably safe when the clutch bolt was tightened; it was also perfectly safe even if the clutch was entirely released, providing the hoistman was doing that which it was his duty to do, i. e., paying attention to his work.

And had the hoistman, Joe Egbert, been watching his work, he could have controlled the descent of the bucket by the brake, and the accident would not have happened.

It will be urged herein that there was in the evidence in this case no proof of actionable negligence, and particularly that the plaintiffs failed to prove any of the specific charges of negligence set forth in their complaint; that if negligence was proven, it was the negligence of a fellow servant or fellow servants, for which the defendant was not liable; that the accident to the deceased was from a risk which he had assumed, and that the deceased himself was guilty of contributory negligence. All of these questions were raised in the trial court upon a motion for non-suit made at the close of plaintiffs' case, and a renewal of such motion, and a motion for a directed verdict made at the close of all of the evidence.

SPECIFICATION OF ERRORS.

I.

The trial court erred in overruling and denying defendant's motion for a non-suit made herein at the close of the testimony introduced in behalf of the plaintiffs, because the evidence introduced by said plaintiffs was insufficient to make out a case for the jury, in each of the following particulars and for each of the following reasons, to-wit:

(a) The plaintiffs failed to prove any of the charges of negligence set forth in their complaint. It was alleged in the complaint and sought to be proven upon the trial that the defendant was negligent (1) in employing a hoistman, Joe Egbert, who was incompetent, inexperienced, nervous and excitable, and which facts were known to the defendant, and (2) in failing to furnish the deceased with a reasonably safe place for the performance of the duties required of him, and (3) in failing to furnish the deceased with proper, safe, suitable and adequate machinery, tools and appliances for the performance of the work required of him in that the bolts, lugs and keys by which the clutch was fastened to the shaft of the drum of the hoist were loose, worn out, unsafe and inadequate, and that the brake band and clutch were worn out, loose, inadequate and unsafe, and that the clutch and the band thereof could not be adjusted by said lever under the control of the hoistman so as to retard and control the speed of said hoist and prevent the same from attaining a dangerous rate of speed and from

falling to the bottom of said shaft, and (4) that defendant was operating through a vertical shaft more than two hundred and fifty (250) feet in depth without having said shaft equipped with a mine cage, skip or bucket fitted with safety clutches, in violation of the state law, and (5) that the bucket was lowered at a greater speed than six hundred (600) feet per minute in violation of the state law, and (6) that a copy of the Idaho Mining code and a copy of the bell signals had not been properly posted as required by the state law, and (7) that the defendant had not promulgated proper and necessary hoist rules, and particularly a rule requiring the hoist to be raised and lowered before permitting men to be transported therein, and (8) that the defendant was negligent in not having its master mechanic make proper and reasonable inspections of the hoisting machinery and apparatus; but the evidence introduced by the plaintiffs failed to prove any single charge of negligence as set forth in said complaint and herein.

(b) Because it did appear from the evidence introduced by plaintiffs that there was no actionable negligence on the part of the defendant which was the proximate cause of the accident to the deceased complained of in plaintiffs' complaint in this case.

(c) Because it appeared from the evidence that the deceased at the time of his accident was guilty of contributory negligence in, (1) in attempting to descend in the bucket before complying with the rules of the defendant requiring one round trip to be made before

men were hoisted or lowered in said bucket, and (2) in descending before ascertaining whether or not the clutch bolt had been tightened when the deceased knew, or by the exercise of reasonable care should or could have known that by reason of the work in which he and his co-laborers were engaged immediately preceding the accident, that the clutch bolt would necessarily have been loosened, and (3) in attempting to leap from said bucket after it had attained a dangerous rate of speed.

(d) Because it appears from the evidence that the instrumentalities, machinery, and apparatus furnished by the defendant were reasonably safe, adequate and in a good state of repair, and that the accident to the deceased was due to the negligence of a fellow servant, or fellow servants, in not using properly an instrumentality, machine or apparatus which was in itself reasonably safe, but which was rendered unsafe by reason of its improper use by a fellow servant, or fellow servants of the deceased; for the negligence of which said fellow servant or fellow servants the defendant was not responsible.

(e) Because it appeared by the evidence that the deceased knew, or by the exercise of reasonable care and prudence could or should have known and appreciated, the risk to which he was subjected at the time of his accident, (1) because of his knowledge of the work which was being performed immediately preceding his accident and his knowledge of the manner in which such work was customarily performed, and (2) be-

cause he had been advised and informed by the hoistman Lytton that the clutch bolt had been loosened by the men that preceded the deceased and his crew in the work of removing the kinks from the cable, and that deceased therefore assumed such risks, and that his accident resulted from an assumed risk.

(f) Because it appeared from plaintiffs' complaint and the evidence adduced in behalf of the plaintiffs that there was no actionable negligence on the part of the defendant which served as the proximate cause of the accident to the deceased.

(g) Because it affirmatively appeared from the evidence introduced by the plaintiffs that the defendant had performed its full duties of furnishing the deceased with a reasonably safe place to work, with reasonably safe instrumentalities with which to work, with competent co-servants, had promulgated proper and reasonably adequate rules, and had inspected with reasonable frequency and regularity and with reasonable thoroughness the instrumentalities so furnished by it, and had not failed in the discharge of any duty which it owed the said deceased.

II.

The trial court erred in overruling and denying defendant's motion for a non-suit renewed at the close of all of the testimony and upon the same grounds that the original motion for non-suit was made, and also in overruling defendant's motion for a directed verdict for defendant upon the same and additional grounds at

the close of the whole testimony, because in addition to the grounds and reasons hereinbefore specified, the evidence was insufficient to warrant the submission of the case to the jury, or a recovery by the plaintiff of any sum whatever, in the following particulars:

(a) Because it appeared from all the evidence in the case that the deceased assumed every risk, and the risk of every defect mentioned in the complaint and mentioned in the evidence as grounds of negligence, and that he knew and appreciated and assumed every risk growing out of the several grounds of negligence set forth in said complaint.

(b) Because it appeared from all the evidence that the deceased met with his accident solely and entirely by reason of his own negligence, or his contributory negligence.

(c) Because it appeared from all of the evidence that if the accident was not due to the negligence of the deceased himself, it was due to the negligence of a fellow servant or fellow servants whose negligence was one of the risks assumed by the deceased and for which negligence the defendant is not liable.

(d) Because the evidence in its entirety failed to prove any actionable negligence on the part of the defendant which served as the proximate cause of the accident to the deceased.

III.

The court erred in giving the following portion of his oral instructions to the jury, to-wit:

"In other words, one who is charged with the duty of performing what it is the master's duty to do, here the defendant company's duty to do, of keeping the mine in safe condition, or the instrumentalities in safe condition, can not be a fellow servant or employe with another, so that in this case if you find that the accident was the result of the negligence of some one who was acting for or in the mechanical department, rather than the operating department, then that is a risk from another employe of the defendant company which the deceased did not assume. He assumed risks from the negligence of fellow employes when those employes were in his department, the mining department, rather than the mechanical department."

IV.

The court erred in giving the following portion of his oral instructions to the jury, to-wit:

"And I have to say to you that the evidence very strongly tends to show that the condition of this screw or bolt, or nut is the proximate cause of the injury, or the accident, rather, and is the only immediate cause of the accident. There is some evidence tending to show that the shaft of the drum was sprung. However, the plaintiffs do not allege, and, as I understand, do not claim now, that this sprung condition of the shaft, even if you credit that testimony, directly contributed to the accident. That was brought in only for the purpose of attempting to explain why it was necessary

to loosen this screw, or bolt, or nut. The defendant contends that it was not sprung, and that that is not the reason for loosening the bolt or nut, and the plaintiff contends that it was. But it is not alleged, and it is not now claimed, that the condition of the shaft of the drum in anywise affected the operation of the hoist upon the evening in question at the time the accident occurred. In other words, the clutch would not have held any better had the shaft been in perfect condition, if it was not in perfect condition. The fact, if it be a fact, that the shaft was sprung, did not in anywise affect the hoist man's control of the hoisting machinery at the time in question. There is some evidence also tending to show that certain keys were loose in and about the mechanism which controlled the clutch or had to do with the operation of the drum, but I have to say to you that there is no substantial evidence tending to show that the condition of these keys in anywise affected the hoist man's control of the hoist at that time."

V.

The court erred in giving the following portion of his oral instructions to the jury, to-wit:

"Now then, gentlemen, if from all of the evidence you find that Mr. Witkouski did not have control of the hoist, that he was not charged with the responsibility of keeping it in repair, if he did not have the direction of the hoist man as to what should be done from time to time in seeing that the

hoist operated properly, but that he could only direct him in so far as giving him the signals and telling him when the hoist should go up and go down, and how rapidly, and so forth, and further that the hoist man, in so far as the mechanical work of keeping this hoist in condition was concerned, was under the control and direction of the mechanical department, ultimately the master mechanic, then you could not find that the hoist man is a fellow servant with the deceased, and therefore the negligence of the hoist man in loosening this screw and leaving it loose, would not be a risk that the deceased would have taken, and if he was injured as a consequence of such negligence then the plaintiffs here could recover."

VI.

The court erred in giving the following portion of his oral instructions to the jury, to-wit:

"You will see that the whole issue there is as to whether or not the hoist man was under the control of Witkouski so far as the mechanical work was concerned of keeping this hoist in condition, or whether he was under the control and direction of the mechanical department, and therefore was representing the master in the performance of this primary duty of keeping the appliances and instrumentalities in a proper condition of repair."

VII.

The court erred in giving the following portion of

his oral instructions to the jury, to-wit:

> "Perhaps, to sum up, and to state what I have already said to you in a somewhat different way, if you find from the evidence that the witness Lytton, who was the hoist man on the shift immediately preceding him, was under the direction and exclusive command and authority of the master mechanic or general foreman, or both, and that Witkouski had no authority over or right to give orders to or direct said Lytton as to the matters and things incident to or pertaining to keeping said hoist in a reasonably safe condition of repair and efficiency, and the said Lytton, when he went off shift, left the same in an unsafe condition of repair and efficiency, without notifying the succeeding engineer, Egbert, of such condition, and that his failure to so notify said Egbert was the proximate cause, or contributed to the death of the deceased Witkouski, then you should find for the plaintiffs."

VIII.

The trial court erred in entering judgment for plaintiffs and against the defendants herein for the sum of Fifteen Thousand ($15,000.00) Dollars upon the verdict of the jury, and in entering the judgment for the amount of said verdict.

SPECIFICATIONS WHEREIN THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE VERDICT OF THE JURY AND JUDGMENT THEREON.

The evidence is insufficient to sustain the verdict of the jury and the judgment thereon in the following particulars and for the following reasons, to-wit:

I.

There is no evidence that the defendant was negligent in employing and keeping in its service the hoist man operating the hoist at the time of the accident, or that said hoist man was incompetent, inexperienced, nervous, or excitable, but on the contrary the evidence affirmatively shows that said hoist man, except upon this single occasion, was a careful, prudent man.

II.

There is no evidence that the defendant failed to furnish the deceased with a reasonably safe place to work, but on the contrary the evidence affirmatively shows that the place where deceased was called upon to perform his duties was reasonably safe.

III.

There is no evidence that the defendant was negligent in failing to furnish to the deceased proper, safe, suitable, and adequate machinery, tools and appliances for the performance of the work required of him, or that the bolts, lugs and keys by which the clutch was

fastened to the shaft of the drum of the hoist were loose, worn out, unsafe, and inadequate, or that the brake band and clutch thereon were worn out, loose, inadequate, and unsafe, or that said clutch and the band thereof could not be adjusted by said lever under the control of the hoist man so as to retard and control the speed of said hoist, but on the contrary the evidence affirmatively shows that said hoist was in reasonably safe condition.

IV.

There is no evidence that the shaft in which deceased was working was not equipped with a cage, skip, or bucket fitted with safety clutches, but on the contrary the evidence shows that said shaft was equipped with a proper bucket fitted with safety clutches.

V.

There is no sufficient evidence to show that the men were lowered by the defendant into its shaft at a greater speed than six hundred (600) feet per minute. but on the contrary the evidence does show that the defendant had promulgated a rule restricting the speed to less than six hundred (600) feet per minute and that if said rule, or said law was violated, it was only upon the single occasion when the deceased met with his accident and was due to the negligence of a fellow servant.

VI.

That there was no evidence that the defendant was

negligent in not promulgating proper and necessary hoist rules and regulations, and particularly a rule requiring the hoist to be raised and lowered before permitting men to be transported therein, but on the contrary the evidence does show that such rules had been promulgated and that their non-observance upon the occasion of the accident to the deceased, if such rules were not observed at said time, was due to the negligence of the deceased himself, or to the negligence of a fellow servant.

VII.

There is no evidence that the defendant was negligent in not having its master mechanic make proper and reasonable inspections of the hoisting machinery and apparatus, but on the contrary the evidence affirmatively shows that reasonable and proper inspections of said hoisting machinery and apparatus were required to be made and were in fact made by the defendant's master mechanic.

VIII.

There is no evidence of any negligence on the part of the defendant which was the proximate cause of the accident to the deceased. While the evidence does disclose the fact that a short time prior to the accident to the deceased, the hoist man on the preceding shift had loosened the clutch bolt, and while there is some evidence that the loosening of this bolt was made necessary by reason of the drum on the shaft being slightly sprung, and while there is evidence tending to show that said hoist engineer had failed to tighten said clutch

bolt, or report his failure to do so to the succeeding hoist man, yet the evidence affirmatively shows that said hoist could still be controlled by the hoist man by means of the proper application of the compressed air and by means of a brake provided for that purpose, and that the rapid descent of the bucket at the time of the accident was due to the failure of the hoist engineer to properly operate said hoist, and not to the sprung condition of the drum, nor to the loosened condition of such clutch bolt.

IX.

The evidence discloses that the proximate cause of the accident to the deceased was due to the negligence of a fellow servant or servants. In this respect the evidence shows that Lytton, the hoist man on the crew preceding the crew of the deceased, had loosened the clutch bolt, and that all of the men upon said preceding crew had been engaged in the operation of taking the kinks out of the cable; that when the deceased and his crew went on shift the work of taking the kinks out of the cable had not been completed and that deceased and his crew continued the work of the preceding crew; the evidence shows that all of the men on both of these crews were, as a matter of law, fellow servants, and that whether the proximate cause of the injury was (as stated by the trial court) the loosening of the clutch bolt and the failure to tighten same, or was the careless operation of said hoist by the hoist engineer, that in either case the negligence which served as the proximate cause for the injury was the negligence of a fellow workman.

X.

The evidence discloses that the deceased had on other occasions assisted in taking kinks out of the cable and knew that it was customary to loosen the clutch bolt to permit of the easier unwinding of the cable; the deceased knew that this had been done when he went to work on the night of his accident; the evidence discloses that without enforcing the rule which required the hoist to be lowered and raised before permitting men to be carried thereon, and without ascertaining whether the clutch bolt had been tightened, the deceased with his men stepped upon the bucket and ordered the lowering thereof; and the evidence shows that in doing so the deceased assumed the risk and every risk of descending in the bucket under the above mentioned conditions and circumstances.

XI.

And for the same reasons and in the same particulars as mentioned in the last foregoing specification, the deceased was guilty of contributory negligence in descending in said bucket under the conditions mentioned in the last foregoing specification, and the evidence further discloses that the deceased had been warned that said clutch bolt had been loosened and was therefore guilty of gross negligence in descending in said bucket without ascertaining whether or not the said clutch bolt had been tightened.

And the evidence further discloses the fact that the men who remained on the bucket were not injured

and that the accident to the deceased was due to his negligence in leaping from said bucket.

ARGUMENT.

There is no proof in this case of actionable negligence on the part of the defendant, but on the contrary the evidence does show that the defendant performed its full duty under the law toward the deceased.

(Specification of Errors, Numbers I a, b, d, f, g; II a and d).

It may readily be conceded that it is the nondelegable duty of the master to exercise ordinary and reasonable care, or the care and skill that a man of ordinary prudence would observe under the circumstances, to furnish his servants with a reasonably safe place to work, and with reasonably safe machinery, appliances, tools and instrumentalities with which to work, and to keep such instrumentalities in reasonably safe repair, and to employ competent and sufficient employes, and to establish, promulgate, and enforce reasonable rules for the safe conduct and regulation of his business. (4 Thompson's Commentaries on the Law of Negligence, Sec. 3767), and that for the failure to perform, or the negligent performance of any of these duties, the master is liable when it appears that such negligence was the proximate cause of the servant's injuries.

The duty of the defendant in this case was to ex-

ercise such watchfulness, caution and foresight as under all the circumstances of the particular situation, a corporation controlled by careful and prudent officers or agents ought to exercise.

Wabash R. C. v. McDaniels, 107 U. S. 454; 27 L. Ed. 605.

F. C. Austin Mfg. Co. v. Johnson, (C. C. A. 8th Cir.) 89 Fed. 677.

Atchison T. & S. F. Co. v. Moore, 29 Kan. 632-644.

The expression of the rule as to the employer's duty as found in the case last above cited is quoted with approval by the Supreme Court of the United States in

Baltimore & Ohio R. Co. vs. Baugh, 149 U. S. 368-387; 37 L. Ed. 781.

> "A master assumes the duty towards his servant of exercising reasonable care and diligence to provide the servant with a reasonably safe place at which to work, with reasonably safe machinery, tools and implements to work with, with reasonably safe materials to work upon, and with suitable and competent fellow servants to work with him; and when the master has properly discharged these duties, then, at common law, the servant assumes all the risks and hazards incident to or attendant upon the exercise of the particular employment or the performance of the particular work, including those risks and hazards resulting

> from the possible negligence and carelessness of his fellow servants and co-employes. And at common law, whenever the master delegates to any officer, servant, agent, or employe, high or low, the performance of any of the duties above mentioned, which really devolve upon the master himself, then such officer, servant, agent, or employe stands in the place of the master, and becomes a substitute for the master, a vice principal, and the master is liable for his acts, or his negligence to the same extent as though the master himself had performed the acts or was guilty of the negligence. But at common law, where the master himself has performed his duty, the master is not liable to any one of his servants for the acts or negligence of any mere fellow servant or co-employe of such servant, where the fellow servant or co-employe does not sustain his representative relation to the master."

And it is the master's duty to furnish such machinery and apparatus as is adequate and suitable for the work to be done, and to keep and maintain the same in such condition as to be reasonably safe for use. (*Gardner v. Michigan Central R. R. Co.* 150 U. S. 349; 37 L. Ed. 1107).

The master, however, is in no respect an insurer or guarantor, and does not warrant the safety or sufficiency of his premises, machinery, tools, appliances or the competency or fitness of the servants whom he selects to carry on his work, or the sufficiency of the rules and regulations which he may have established

for the conduct of his work; he is bound only to use reasonable care. (4 Thompson's Commentaries on the Law of Negligence, Sec. 3767).

It becomes, then, a question of prime importance to determine whether the defendant in this case did use reasonable care in the performance toward the deceased of its nondelegable duties.

It was charged in the complaint as one ground of negligence that the defendant had failed to furnish the deceased with a reasonably safe place in which to perform his work and labors, but no evidence was introduced upon this question, and the case was not tried upon the theory that defendant had failed in the discharge of this duty, and we conceive this question to be out of the case.

The only servant whose competency was ever questioned was the hoist man, Joe Egbert, who, it was alleged in the complaint, was incompetent, nervous and excitable. But both by a failure to attempt to prove this charge, as well as by the express admission of counsel that they had failed to prove the same, this ground of negligence is also out of the case.

If the plaintiff is permitted to finally recover in this case it must be upon the theory that the defendant failed in the discharge of its duty to furnish the deceased with reasonably safe instrumentalities, and failed to keep said instrumentalities in reasonably safe condition and repair, and failed to properly inspect the same.

The instrumentalities in question were the hoisting apparatus, and the bucket used in conjunction therewith, in the work of sinking a new shaft on the defendant's property.

As to the bucket, no evidence was introduced tending to show that it was of a kind or character unfit for the work, or was in anything but the best condition. On the contrary the evidence of plaintiffs' own witnesses does show that it was customary wherever a shaft is being sunk, and before it has finally been finished, to use a bucket rather than a cage and that the buckets usually used were of the same general type as the one used by defendant in this shaft at the time of the accident (Testimony of Edw. P. Moran, p. 50).

> "Q. And it is customary where a shaft is being sunk, and before it has finally been finished up, to use a bucket rather than a cage, is it not?
>
> "A. Yes, sir.
>
> "Q. That is always the custom?
>
> "A. Yes, sir.
>
> "Q. And the buckets used elsewhere where you have worked were of the same general type as this bucket?
>
> "A. They were."

And the bucket was provided with safety crosshead in accordance with the Idaho State law. (Testimony of Edw. P. Moran, pp. 58 and 59). And counsel

for plaintiffs finally admitted that they could no longer base a charge of negligence on the kind or character of bucket used, or its not having been supplied with statutory safety devices, (pp. 165-166). And finally as to this particular instrumentality, the evidence shows that nowhere, except in the complaint, has there been the slightest claim that the bucket and cable used were not of the usual kind, and of a proper type, properly installed and properly used at the time of the accident.

The hoist itself was comparatively new, having been built in 1914, approximately two years prior to the accident (Testimony of G. C. Karr, p. 226). It was the same general type of hoist used in such work. Mr. Karr testified (pp. 222 to 225) that there was no particular difference between this hoist and other kinds of different makes, that they are practically all alike. And on this question we are finally aided by the admission of plaintiffs' counsel that the hoist itself was a proper kind and of sufficient capacity (p. 228) and that his only contention was that it was not in proper condition at the time of the accident.

On the question of the inspections which were made of this hoist, there is the testimony of one witness only, to-wit: Edw. E. Hughes, the defendant's master mechanic. This witness testifies (p. 231) that immediately prior to the 18th day of May, 1916, the day on which the deceased met his death, that he, the master mechanic, was personally inspecting the machinery used at the defendant's mine; that he inspected

such machinery daily and that he had inspected this particular hoist between 7:30 and 9:00 o'clock on the night of May 17th, being the night before the accident (p. 231) at which time he inspected the cable and clutch, the brake, and the bearings and the drum shaft and found everything to be in good condition. As the accident happened about 11:00 o'clock p. m. on May 18th, this last inspection was approximately twenty-six hours immediately preceding the accident. The testimony of Mr. Hughes is absolutely uncontradicted as to the making of this or other inspections, or as to the custom of inspecting the machinery daily, and the plaintiffs did not attempt to prove, although charging it in their complaint, that the defendant had failed to provide an adequate system of inspections, or had failed to make proper or reasonable inspections, and the undisputable evidence in the case is that reasonable inspections were made prior to the accident.

Taking up now the actual condition of the hoist The only testimony which in any way criticises its condition was that of J. H. Lytton, who was the engineer who had loosened the clutch bolt and failed, not only to tighten the same, but also to report the fact of its loosened condition to the succeeding hoistman; although as we have stated before he may possibly be excused for this oversight in the face of the evidence that he did report to Witkouski that the clutch bolt was loose. Lytton says that the drum shaft was sprung on the hoist, and that for this reason it was necessary in unwinding the cable to loosen the clutch bolt,

and also describes some conditions which had led to what he describes as "lost motion" between the shaft on the drum and the clutch bands. In this connection it should be noted that no fault is found by the plaintiffs in this case with the condition of the shaft or the drum, or the drum itself and that the sprung condition of this shaft was not one of the charges of negligence in the complaint. Lytton further testifies, however, that even when the clutch bands were completely loosened the hoist could still be controlled and instantly stopped by the application of the brakes. He says:

> "Q. In case this clutch was loose, would your engine have any retarding effect at all when you tried to lower the men down?
>
> "A. No, sir, not if the clutch was loose.
>
> "Q. How long would it take you before you could apply the emergency brakes if you found the engine wouldn't hold it?
>
> "A. *In an instant.*" (P. 125).

and again

> "Q. How far could it have dropped before you could have stopped it?
>
> "A. Well, if a man is looking what he is doing he will never let it drop no distance.
>
> "Q. Providing he can do it quick enough?
>
> "A. Well, you can work—you have always got

a firm pressure with your brake all the time.

"Q. If you didn't anticipate it you wouldn't be prepared would you?

"A. The chances are that bucket may drop ten feet with you before you would realize just what happened." (P. 126).

It will be observed from this testimony, that irrespective of any alleged defect in the drum of the hoist, and irrespective even of the loosened clutch, the hoist could still be perfectly controlled by the engineer if as plaintiffs' witness says "if a man is looking what he is doing." So that the charge of negligence complained of in this case finally goes right back to the *carelessness of Egbert in the actual operation of the hoist.* The shaft may have been sprung, Lytton may have been negligent in loosening the clutch bolt, and the doing of this act may have been necessary because of the sprung condition of the shaft; Lytton may have been negligent in not reporting this fact to Egbert, or even in not reporting this fact to Wtikouski, and Egbert may have been negligent in not tightening the clutch bolt before commencing the work of lowering the men, *but irrespective of all these facts, had Egbert been careful in the manner of operating the hoist, the hoist would still have worked properly and the accident would have been avoided.*

It was urged in the trial court upon defendant's motion for a non-suit, and for a directed verdict, that the plaintiffs had signally failed in their attempt to

prove any of the charges of negligence set forth in their complaint, and which have heretofore been enumerated in this brief. The trial court took the position, to quote his own statement, that "it cannot be questioned that the failure to tighten the screw before using the hoist constituted negligence on the part of some one." But if this be the negligence upon which the plaintiffs now claim the right to recover, then the defendant was deceived by plaintiffs complaint, for nowhere in that document is there any suggestion of this charge of negligence. It was not alleged in the complaint that the accident had been caused by the loosening of this clutch bolt and the failure to tighten the same, but it is, rather, the allegation of the complaint that the accident was caused by the careless operation of the hoist by Egbert, due, as it was alleged in the complaint, to the fact that he was nervous, excitable and inexperienced. Apparently, sometime between the drawing of this complaint and the trial of the action, counsel for plaintiffs discovered the fact that if they relied upon the carelessness of the hoistman in the operation of the hoist, they would be met by the legal defense that Egbert was a fellow servant, and it, therefore, become necessary to evade this question and seek to recover under some other theory.

The negligence, if any, which served as the proximate cause of this accident was the negligence of a fellow servant, and was one of the risks assumed by the deceased, and for damages growing out of such negligence the heirs of deceased cannot recover.

As a general proposition, all who enter the employment of a common master to accomplish a common undertaking are *prima facie* fellow servants, although their grades of service are different, and although some direct and supervise the men subject to their command and their work, while others perform the labor.

Weeks v. Scharer (C. C. A. 8th Cir.) 111 Fed. 330.

Where fellow servants are engaged in a common employment, each of them in entering the service assumes the risk that the other may fail in that care and vigilance which are essential to his safety.

N. P. R. R. vs. Herbert, 116 U. S. 642; 29 L. Ed. 755.

Weeks v. Scharer, supra.

And while considerable time was spent in the trial of this case in the introduction of testimony tending to prove or disprove that Witkouski was the boss of the shaft crew, and that he did, or did not, exercise supervision over the hoist man, we are not satisfied that this is of any great importance one way or the other. If, at the time of this accident, Egbert and Witkouski were engaged by a common master, in a common employment which brought them into such contact, one with the other, that each would know that his safety might be endangered by the negligence of the other, then they were fellow servants, irrespective

of the grade of their employment, or whether one exercised supervision over the other.

As we understand the position of the Court, however, in sending this case to the jury, His Honor took the position that for the time being at least Egbert and Witkouski were employed in different departments of the master's business.

The first case we have noticed in the Federal Courts which discussed the question as to whether or not persons employed in different departments of the work are fellow servants is *Randall vs. B. & O. R. R.*, 109 U. S. 478; 27 L. Ed. 1003.

In that case a brakeman of one train had left his train to turn a ground switch in one of the railroad yards of the defendant; while working at this switch, and not being entirely familiar with that kind of a switch, he was struck by an engine running on another track. The negligence charged was that the engine man on the train which struck the plaintiff had not complied with the State laws in regard to the blowing of the whistle and the ringing of the bell. The defense was that the brakeman on the one train, and the engine man on the other train were fellow servants. The Court in discussing this question says:

> "The general rule of law is now firmly established, that one who enters the service of another takes upon himself the ordinary risks of the negligent acts of his fellow servants in the course of the employment. This Court has not hitherto had occa-

sion to decide who are fellow servants, within the rule. In Packet Co. v. McCue, 17 Wall. 508 (84 U. S. XXI, 705) and in R. R. Co. v. Fort, 17 Wall. 553 (84 U. S. XXI, 739), the plaintiff maintained his action because at the time of the injury he was not acting under his contract of service with the defendant; in the one case, he had wholly ceased to be the defendant's servant; in the other, being a minor, he was performing, by direction of his superior, work outside of and disconnected with the contract which his father had made for him with the defendant. In Hough v. R. Co. 100 U. S. 213 (XXV., 612), and in R. Co. v. McDaniels (ante, 474), the action was for the fault of the master; either in providing an unsafe engine, or in employing unfit servants.

"Nor is it necessary, for the purposes of this case, to undertake to lay down a precise and exhaustive definition of the general rule in this respect, or to weigh the conflicting views which have prevailed in the courts of the several states; because persons standing in such a relation to one another as did this plaintiff and the engine man of the other train, are fellow servants, according to the very great preponderance of judicial authority in this country, as well as the uniform course of decision in the House of Lords, and in the English and Irish courts, as is clearly shown by the cases cited in the margin. * * * *They are employed and paid by the same master. The duties of the two bring them to work at the same place at the*

same time, so that the negligence of the one in doing his work may injure the other in doing his work. Their separate services have an immediate common object, the moving of the trains. Neither works under the orders or control of the other. Each, by entering into his contract of service, takes the risk of the negligence of the other in performing his service; and neither can maintain an action, for an injury caused by such negligence, against the corporation, their common master."

The above case was decided in 1883. Thus early did the Supreme Court of the United States adopt the view that where the work of the two servants brought them at the same place, at the same time, so that the negligence of one might work to the injury of the other, that they were fellow servants even though engaged in different branches of the work and in different capacities.

The Randall case was discussed at length by Justice Brown in the case of *N. P. R. Co. v. Hambly* (154 U. S. 349), 38 L. Ed. 1009. In the latter case the plaintiff was a common laborer, working for the railroad company under the direction of a section boss on a culvert and was injured by a passing train through the negligence of the engineer and conductor. We invite the Court's careful attention to the entire opinion in this case, discussing as it does all of the cases involving gradations of rank between persons in the employment of a common master, which had been decided by the Supreme Court up to that time (1894). In refusing

to hold that the plaintiff, because engaged in a different department of the work, was not a fellow servant with the engineer and conductor of the passenger train, Justice Brown says:

> "To hold the principal liable whenever there are gradations of rank between the persons receiving and the persons causing the injury, or whenever they are employed in different departments of the same general service, would result in frittering away the whole doctrine of fellow service. Cases arising between persons engaged together in the same identical service, as, for instance, between brakemen of the same train or two seamen of equal rank in the same ship, are comparatively rare. In a large majority of cases there is some distinction either in respect to grade of service, or in the nature of their employments. Courts, however, have been reluctant to recognize these distinctions unless the superiority of the person causing the injury was such as to put him rather in the category of principal than of agent, as, for example, the superintendent of a factory or railway, and the employments were so far different that, although paid by the same master, the two servants were brought no farther in contact with each other than as if they had been employed by different principals."

And in line with the above statement from our highest Court it may be observed in this case that far from Joe Egbert exercising supervision over Witkou-

ski, it is more probable from the evidence that Witkouski exercised a supervising authority over Egbert.

In the above mentioned case Justice Brown cites with approval the case of *Quebec Steamship Co. v. Merchant* 133 U. S. 375; 33 L. Ed. 656.

In the latter case the plaintiff was one of a ship's crew. The entire crew consisted of some thirty-three persons and was divided into three classes of servants, called three departments, viz., the deck department, the engineer's department, and the steward's department. The captain, the first and second officers, the purser, the carpenter and the sailors were in the deck department. The engineers, the firemen and the coal passers were in the engineer's department; the steward, the waiters. the cooks, the porter and the stewardess were in the steward's department. The plaintiff was the stewardess, working in the last mentioned department. The ship had stopped at the Island of Trinidad to let off some passengers, which was done by raising certain rods which permitted the opening of the gangway. After the passengers and baggage had been discharged the carpenter and the porter attempted to replace the rods in their proper position and thus close the gangway. A sudden rain came up and the carpenter and porter having placed the gangway in position and without fastening the hooks which held the same, left it in that condition until the rain should cease. In the meantime the stewardess came to empty something over the side of the ship and when she leaned against the gangway, it gave way, and she fell from the ship,

striking a nearby boat and sustaining severe injuries. The accident was due to the failure of the carpenter, one of the laborers in the deck department, to place the rods which held the gangway in proper position and to fasten the same. The defense was that the negligence was that of a fellow servant. The lower court refused to direct a verdict for the defendant, in reversing which judgment the Supreme Court speaking through Mr. Justice Blatchford, said:

> "We think the court ought to have directed the jury to find a verdict for the defendant, on the ground that the negligence was that of a fellow servant, either the porter or the carpenter. As the porter was confessedly in the same department with the stewardess, his negligence was that of a fellow servant. The contention of the plaintiff is that, as the carpenter was in the deck department and the stewardess in the steward's department, those were different departments in such a sense that the carpenter was not a fellow servant with the stewardess. But we think that, on the evidence, both the porter and the carpenter were fellow servants with the plaintiff. The carpenter had no authority over the plaintiff, nor had the porter. They and the plaintiff had all signed the shipping articles; and the division into departments was one evidently for the convenience of administration on the vessel, and did not have the effect of causing the porter and the carpenter not to be fellow servants with the stewardess."

See also:

Baltimore & Ohio R. R. Co. v. Baugh, 149 U. S. 368; 37 L. Ed. 772.

Central R. R. Co. v. Keegan, 160 U. S. 259; 40 L. Ed. 418.

We contend that, even adopting the view of the Court that Egbert was temporarily a servant of the mechanical department, and even though Witkouski was still a servant of the operating, or mining department, that under this decision, as well as others, which we will in a moment cite, the work which these two men were jointly engaged in prosecuting, viz., the sinking of this new shaft, brought them into such close contact that each must necessarily have anticipated that his safety might be endangered by the carelessness of the other, and that, to quote from the Hambly case, "it would be frittering away the whole doctrine of co-service to hold that these men were not fellow servants because employed in different departments of the work."

The case of *Quebec Steamship Co. v. Merchant, supra.* is indistinguishable in principle from the present action; as are also:

Buckley v. Gould (C. C. Nev.) 14 Fed. 833.

Hermann v. Port Blakely Mill Co. (D. C. Cal.) 71 Fed. 853.

Spring Valley Coal Co. v. Patting (C. C. A. 7th Cir.) 86 Fed. 433.

Thelcman v. Moeller (Iowa) 34 N. W. 765.

Bradbury v. Kingston Coal Co. (Penn.) 27 Atl. 400.

Williams v. Verona M. C., 149 Mich. 45; 112 N. W. 496.

The chief question in *Buckley vs. Gould, supra.,* was whether the engineer of a steam engine employed in lowering men into a mine was a fellow servant in the same line or department of service with the men working at the bottom of the shaft. Circuit Judge Sawyer held that they were. Judge Sawyer cites a great many cases in support of his conclusion, and among other things says:

> "But the foundation of this action is that the accident was the result of the carelessness of the man who was running the engine. He was not an agent of the company. He had no authority over the plaintiff. He was merely a workman running an engine under the direction of a chief engineer, a general foreman, and a superintendent of the mine. It was not his business to furnish the engine. He had no authority whatever. He was co-operating with plaintiff in sinking the shaft. He was simply a fellow servant co-operating in sinking the shaft. We do not think it makes any difference whether he was running an engine, or working with a wheel and axle, a pulley and bucket, or carrying the material up and down a ladder upon his shoulders. He was doing the same work,

but doing it by a different means. Every man below performed his part of the work in sinking the shaft—the work in which they were all engaged. They were working together in the same department in excavating this shaft. The fact that the engine-runner, as he is called, was using a different instrument in carrying the material up and supplies down makes no difference. It was work done in a common employment to accomplish a common end—the sinking of a shaft. One servant performed one part, and another another part."

In *Hermann vs. Port Blakely Mill Co., supra.*, the plaintiff was the mate of a vessel. At the time of the accident he was engaged, with a number of men on board the vessel, in loading lumber from a nearby dock. A chute had been erected from the dock to the vessel and the lumber was placed in the chute and allowed to slide down into the vessel. In the discharge of its nondelegable duty to warn the men below when lumber was placed in the chute, the master had designated one of the men on the wharf to give a warning cry whenever a piece of lumber was placed in the same in order to enable those below to get out of the way. And if this warning cry was given there was no danger to the men below, as the place where they were working was in itself proper and safe. The men on the wharf failed to give the warning at the time a large piece of lumber was sent down the chute and the plaintiff was struck and severely injured. The decision is by Judge Morrow. In stating the issue in the case the Court said:

"The question then occurs, is the employer, the Port Blakely Mill Company, liable to the libelant for this negligence of his co-employe? It is contended by counsel for defendant that the company can not be held responsible, because libelant was a fellow servant with the employe whose duty it was to give the warning signal, and that he was not injured through any fault or omission of duty which the company, as employer, owed to its employes. The libelant's counsel argues that this contention is not sound, for the reason that among the positive duties and obligations which the employer owes to his employes, is that of providing a safe place for the employes in which to work; that, applying this rule to the case at bar, it was necessary for the maintenance of that safety to give warning as each piece of lumber was sent down into the hold of the vessel; and that the giving of this warning was one of the duties which the law imposes upon the master personally, for failure to perform which, whether it be his personal negligence or of his servant, acting in his stead, damages may be awarded."

The Court then discussed the general duty of the master to furnish a safe place to work, and concedes that duty to be a positive and personal one, and then says:

"The question here is whether the negligence of the person on the wharf whose duty it was to give the warning signal, and who failed to do so, was a breach of the master's duty to furnish libelant a

reasonably safe place to work in, or whether it was the negligence of a fellow servant, not engaged in the performance of a positive duty required of the master. It is important to observe in this connection that libelant was not injured by reason of any defect or inherent danger in the premises or place where he was engaged in working, which the master knew or should have known, and which libelant did not know; but he was injured solely by reason of the fact that the person whose duty it was to give the warning signal omitted to do so. No question was raised at the hearing as to the safety of the hold and between decks, so far as the place itself was concerned, nor as to the sufficiency and fitness of the implements and instrumentalities used in loading, nor as to the competency of the person whose duty it was to give the signal to discharge that service. No negligence on the part of the company in employing and selecting the particular individual to give the warning was shown, and, so far as that feature of the case is concerned, it may be taken as conceded that he was competent. The legal presumption is that he was competent, and that the master discharged his duty to the libelant in that respect, no proof to the contrary having been submitted."

And again:

"The contention of counsel for libelant is that the place where libelant was working was rendered unsafe by reason of the fact that the person

on the wharf whose duty it was to give the warning failed to do so, and that this negligence constituted a breach of duty on the part of the master to furnish a safe place for libelant to work in. The word "place," in my judgment, means the premises where the work is being done, and does not comprehend the negligent acts of fellow servants, by reason of which the place is rendered unsafe or dangerous. The fact that the negligent act of a fellow servant, renders a place of work unsafe is no sure and safe test of the master's duty and liability in this respect, for it may well be said that any negligence which results in damages to some one makes a particular spot or place dangerous or unsafe. To so hold would virtually be making the master responsible for any negligence of a fellow servant which renders a place of work unsafe or dangerous. It would be doing the very thing which it is the policy and object of the general rule not to do. It would create a liability which the master could not avoid by the exercise of any degree of foresight or care. In this case the person who was detailed to give the warning signal, and ommitted to do so, was, undoubtedly, both in reason and upon authority, a fellow servant of libelant. They were both engaged in a common employment, viz, that of loading lumber; both were employed and paid by the same common master, The Port Blakely Mill Company."

The entire opinion in this case is instructive and directly applicable to the question in the present action.

Spring Valley Coal Co. v. Patting, supra., is also directly in point. The plaintiff had been injured while being lowered in a skip or bucket to the bottom of the shaft in defendant's mine. The falling of the bucket at great speed was due to the fact that the hoist engineer had failed to expel the water from the cylinder of the engine. There was no defect in the reversing apparatus, the accident was simply due to the negligence of the hoistman in performing his duty, and the Court held that the hoist engineer and the plaintiff were fellow servants, and that the plaintiff for that reason could not recover.

An effort, doubtless, will be made by plaintiff's counsel to distinguish this case from the case at bar by urging that in the Patting case the accident was due to unskillful operation of the instrumentality, while it will be claimed that in the present case the accident was due to the loose clutch bands. But it will be remembered that the undisputed evidence is that irrespective of any condition of the clutch and the clutch bands, the hoist was still under perfect control of the engineer by means of the brake and the air.

In *Thieleman v. Moeller, supra.*, the plaintiff was employed to operate a machine for sawing; he was injured by reason of the carelessness of the engineer in charge of the engine which supplied the motive power to run the saw. The particular negligence complained of was that the engineer, whose duty it was not only

to operate the engine, but also to inspect the same and keep it in good condition and to supply defects and to make repairs, had failed in the performance of those duties. Nevertheless, the Supreme Court of Iowa held that the operator of the machine was a fellow servant with the engineer who was performing the duties of the master in inspecting and keeping the machine in repair. The duties of the engineer in the above case extended to the repairing of the saw and machine itself upon which the plaintiff was employed at the time of his injuries.

In *Bradbury v. Kingston Coal Co., supra.,* the defendant's hoist engineer, while lowering a number of men, including the plaintiff, into the shaft, lost control of the hoisting apparatus. This, it was claimed, was due to the breaking of a cotter pin. The engineer then undertook to stop the engine by application of the reverse lever, but by pulling the lever too far he reversed the engine instead of stopping it. The deceased had then attempted to jump on a landing but had failed and was killed. The other men, as in the case at bar, who stayed in the bucket were uninjured. The discussion of the cause of the accident found at page 403 of the opinion is particularly applicable to the point which we have been endeavoring to make, that is, that the loosened clutch bands, by whatever means they became loosened, was not the proximate cause of Witkouski's accident; that this condition only gave rise to the necessity to use the braking apparatus supplied for just such contingencies, and that it was the failure of the

hoist engineer to properly use this brake which caused the accident. We quote from this decision:

> "In the third place, the dropping out of the pin did not cause the accident. Ordinarily, in cases of this kind, the injury or death resulting from defective machinery is immediately caused by the defective appliance, machine, or apparatus, and it is therefore against defendant. But here neither the pin, nor the lever which it held in place, inflicted any injury upon anyone. It only gave occasion for the engineer to arrest the further descent of the cage, which he did. What took place after that was only what might have taken place upon any occasion for stopping the cage; that is, the engineer, wishing to raise the cage a few feet, to the top of the shaft, made a mistake in drawing his reverse lever a trifle too far, and so produced a greater elevation of the cage than was necessary or than he intended. And even this mistake of the engineer was not the sole cause of the accident, for, had the deceased miner remained on the cage nothing that was done, or had occurred, or was omitted to be done would have caused the accident. The accident was the result of a mistaken judgment of the deceased as to the fact of his being in danger. He was in reality in no danger, but he, being one of three, all of whom were in the same exigency, thought he was in danger, and jumped, and lost his life as a consequence of his jump, while the other two, thinking differently

upon the same subject, remained on the cage and were not harmed."

The Court held (page 401) that the engineer was a fellow servant of the deceased and for his mistake, whether negligent or otherwise, the defendant company was not liable.

In the Baugh case (149 U. S. 385; 37 L. Ed. 780), Mr. Justice Brewer after discussing at length the question of when employes were and were not co-servants, and seeking a test by which to determine the status of different employees, says that the true test is "rightfully this, there must be some personal wrong on the part of the master, some breach of positive duty on his part. If he discharges all that may be called positive duty, and is himself guilty of no neglect, it would seem as though he was absolved from all responsibility, and that the party who caused the injury should be himself alone responsible."

Applying this test to the case at bar, one would seek in vain for any breach by the defendant of a personal obligation to the deceased. Indisputably it had discharged all of its personal duties and obligations, and particularly it had furnished its servants with safe instrumentalities, and the neglect which was responsible for the accident to the deceased consisted, at the most, of making unsafe an instrumentality which at the time it was furnished by the defendant was entirely safe and in perfectly usable condition.

And the negligence which served as the proximate

cause of the accident to the deceased was not only the negligence of a co-servant, but such negligence was in relation to the details of the work being done.

There exists a well recognized distinction between defects or dangers which constitute part of the details of the work being done, and those which do not; and a master who has furnished a reasonably safe place in which to work, and reasonably safe instrumentalities with which to work, and has properly inspected the same, can not be held liable to a servant whose fellow servant has, by his negligence, rendered that place or those appliances unsafe, without the master's fault or knowledge.

In the instant case the instrumentality was safe; it was inspected a short time before the accident, and a short time after the accident, and at both times is shown to have been safe. If, in the interim between these two inspections it was at any time unsafe, a fact which we do not admit, it was made so by the deliberate act of a servant, who in performing a detail of the work, found it more convenient to make an adjustment upon the instrumentality. It was no part of the master's duty either to loosen the clutch bolt on this hoist, or to tighten the same: this was an act unnecessary to perform, and one which the servant in question did merely for the convenience of himself and the men working with him. To hold that in doing this act the servant was performing a nondelegable duty of the master to repair or keep the instrumentality in usable condition, would be to hold that it was the duty of the master to

be personally present at all times to see that no changes and no adjustments were made in the machinery by the servant intrusted with its operation, which might endanger his co-laborers.

See:

Herrmann vs. Port Blakely Mill Co., cited *supra.*

Baird vs. Reilly, 92 Fed. 884.

Gulf Transit Co. vs. Grande, 222 Fed. 817.

Cybur Lumber Co. vs. Erkhart, 238 Fed. 751.

American Bridge Co. vs. Seeds, 144 Fed. 605.

Cleveland C. C. & St. L. Ry. vs. Brown, 73 Fed. 970.

It was said by Judge Cochran in *Kinnear Manufacturing Company vs. Carlisle*, 152 Fed. 933, that the positive, personal and nondelegable duty of the master to provide a reasonably safe place in which to work, and reasonably safe appliances with which to work, and a reasonably safe method of doing the work, is a duty of *construction* and *provision*, and not of operation (citing *Pennsylvania Co. vs. Fishback*, 123 Fed. 465; *American Bridge Company vs. Seeds, supra.*). In the present case it is no longer open to argument that the master had provided a safe instrumentality, and that the accident was due to the unsafe manner of operation. It is the personal duty of the master to furnish and provide the safe instrumentality, but it is not his per-

sonal duty to safely use such instrumentality; that is the duty of the servant.

Nor is the fact that the defendant did not in pleading its affirmative defenses allege that the death of Witkouski was caused by the negligence of a fellow servant affect the question, although, apparently, this was made the basis of the Court's refusal to take the case from the jury upon that ground. For a plaintiff, seeking to recover damages on account of the negligence of a defendant, is required to prove more than mere negligence in the abstract,—he must assert and prove actionable negligence as distinguished from the negligence of a fellow servant, and the like, for which the injured party can not recover.

And it is expressly held in *Pennsylvania Co. vs. Fishback*, 123 Fed. 465 (59 C. C. A. 269), and in *Morgan Construction Co. vs. Frank*, 158 Fed. 964, that it is not necessary that the defendant shall specially plead the act or the negligence of a fellow servant as a defense.

In fact a reading of Sec. 4221 of the Idaho Revised Codes, which in terms makes contributory negligence a matter of defense and provides that in actions based on negligence it shall not be necessary for the plaintiff to plead or prove the negative of contributory negligence, would indicate that contributory negligence is the only defense to an action to recover damages for negligence which is not embraced within a denial drawn in conformity with the statute, but which must be affirmatively set up; for if it had been the legislative intent to require the affirmative pleading by the defendant of

assumption of risk, and the fellow servant doctrine, it may well be thought that the statute itself would have so required.

Moreover, the fact of the clutch bolt having been loosened, and the failure of the hoistman to notice that fact, or to notice the rapid descent of the hoist, and his failure to properly apply the brake, were but transitory dangers to which the men on the bucket were subject by reason of carelessness of co-servants.

It has been said that where the danger to which the plaintiff was exposed was merely a transitory one, existing only on the single occasion when the injury was sustained, and due to no fault of plan or construction or lack of repair, and to no permanent defect or want of safety in the defendant's works, or in the manner in which they had been ordinarily used, the injured employee can not recover.

> *Meehan v. Spiers Mfg. Co.* (Mass. 1899), 52 N. E. 518.

And the same rule has been again stated in the following language, to-wit:

> "The absolute obligation of an employer to see that due care is used to provide safe appliances for his workmen is not extended to all the passing risks which arise from short-lived causes."
> *Whittaker vs. Bent,* (Mass.), 46 N. E. 121.

And to the same effect are:

Haskell et al vs. Prezezdziankowski (Ind. 1908) 83 N. E. 626.

Eddleman vs. Pennsylvania Co. (Penn. 1909), 72 Atl. 557.

Wickham v. Detroit United Ry. (Mich. 1910), 125 N. W. 22.

E. Van Winkle G. & M. Co. v. Brooks, (Okla. 1911), 116 Pac. 908.

And unless it could be said that it was the duty of the defendant company to have its master mechanic present to inspect the hoist and make whatever adjustment might be necessary, each time the machine was used, it must be admitted in this case that the particular condition out of which this accident arose was but a transitory condition arising between the times when reasonable inspections were made.

In fact it is a rule of well nigh universal application that the proof of a defect in machinery, or its being out of repair must be brought home to the master, either by express notice or by its existence for such a length of time as will charge him with notice, before he can be held responsible.

Thus in *Pockrass v. Kaplan,* 139 N. Y. Supp. 398, where a statutory guard had been removed from a circular saw because its presence was impracticable for a particular kind of work, it was held that the master was entitled to a reasonable time in which to discover the absence of this guard by inspection, and cause it to

be replaced before he would be liable for injuries resulting from its absence.

To the same effect is *Schlappendorf v. Amer. R. T. Co.*, 141 N. Y. Supp. 486.

And in *Bradbury v. Kingston Coal Co., supra.*, it is said:

> "In the fourth place, the testimony develops at best simply a case of ordinary accident resulting from an unforseen cause, not discoverable in advance of its occurence, with no visible defect in any part of the machinery, and no knowledge of any defect on the part of the men who were constantly using the machinery, or of the company that employed them. The case comes clearly and distinctly within a number of our own decisions, and the general principle applicable to all is thoroughly expressed in one of the oldest of them. *Baker v. Railroad Co.*, 95 Pa. St. 211. Mr. Chief Justice Sharswood, speaking for the court, there said: "A servant assumes all the ordinary risks of his employment. He cannot hold the master responsible for an injury which cannot be traced directly to his negligence. If it has resulted from the negligence of a fellow servant in the same employment, he must look to him and not to the master, for redress. The master does not warrant him against such negligence. The duty which the master owes to his servants is to provide them with safe tools and machinery, where that is necessary. When he does this he does not,

however, engage that they will always continue in the same condition. Any defects which may become apparent in their use it is the duty of the servant to observe, and report to his employer. The servant has the means of discovering any such defects which the master does not possess. It is not negligence in the master if the tool or machine breaks, whether from an internal, original fault not apparent when the tool or machine was at first provided, or from an external apparent one, produced by time, and not brought to the master's knowledge. These are the ordinary risks of the employment which the servant takes upon himself. *Ryan v. Railroad Co.*, 23 Pa. St. 384." The present case is conspicuously within the operation of this ruling. The wire pin is conclusively shown to have been amply sufficient for its purpose, and free from original defect, by the fact that for seven years it continuously and successfully served its use without any change, repair, substitution, or visible defect. It gave no external indication of defect up to the moment of the accident, and there is no testimony that it had diminished in size, or changed in appearance or in substance; no crack or flaw was discovered, and on the actual testimony in the cause no defect was visible or known to the engineer, the mine inspector, or the defendant. The breaking of the wire pin, therefore, was apparently, or possibly, "produced by time and use," from a cause "not brought

to the master's knowledge." Under the foregoing decision, "these are the ordinary risks of the employment which the servant takes upon himself."

And to the same effect is:

American Bridge Co. v. Seeds, (C. C. A. 8th Cir.) 144 Fed. 605, 609.

In fact it may be said as a general proposition that there is no negligence where there is no knowledge of the danger on the part of the master, and no knowledge of the defect in the instrumentality said to have caused the injury. A master who has furnished his servants with safe instrumentalities for the doing of their work, may rest upon the presumption that such instrumentalities will be safely and properly used.

Contributory Negligence.

The facts surrounding the accident to the deceased have been quite fully set forth, so that it is unnecessary at this point to enter into any lengthy discussion of the proposition that the deceased himself was guilty of contributory negligence. It was affirmatively shown that the deceased himself had operated this hoist; that its condition at the time of the accident was just the same as it had been for many months prior thereto,—even before it had been moved down to the new shaft. The deceased had, also, on other occasions aided in the operation of uncoiling and rewinding the cable, and knew that it was customary when doing so to loosen

the clutch bands in identically the same way as had been done by Jacobson's crew on the day of the accident. He had two sources of knowledge that the clutch bands had been loosened upon the particular night of the accident, viz., that the work of rewinding the cable was unfinished when he went to work, a fact sufficient in itself to warn the deceased of the loosened clutch bands, and was told by Lytton that the bands had been loosened. Whatever risk there was in descending upon the bucket was known to the deceased and in attempting to descend into the shaft without seeing that the hoist was in safe condition the deceased was guilty of contributory negligence. In this connection it must be remembered also that admittedly the hoist man, insofar as lowering and raising the bucket was concerned, took his orders from Witkouski; that a positive rule promulgated by the defendant required the bucket to make one complete trip before men were lowered or raised thereon. It is beyond dispute that the duty to see that this rule was obeyed was upon Witkouski. He, however, without requiring, or even permitting the hoistman to try out the machine, loaded the bucket and climbed upon it, followed by his men, without heed to the defendant's rule. In this, also, he was guilty of contributory negligence. And, finally, his death was due entirely to his own act in leaping from the bucket, rather than in staying on the same as the other men did, and in doing which he would have received no injury.

Summarizing then the contentions of the Plaintiff

in Error in this case, we respectfully submit that the master had discharged its full duty towards the servant, and that clearly the only negligence which, in view of all of the evidence in the light most favorable to the plaintiffs, it could be said was proven, was the negligence of a fellow servant in relation to a mere detail of the work; that the proximate cause of the accident to the deceased was not embraced in any of the charges of negligence set up in the complaint; and that the deceased was himself guilty of contributory negligence.

Respectfully submitted,

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